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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN MCPHERSON,

Defendant and Appellant.

2d Crim. No. B217711
(Super. Ct. No. F426400)
(San Luis Obispo County)

Steven McPherson appeals his conviction by negotiated plea to two counts of issuing insufficient fund checks. (Pen. Code, § 476a, subd. (a).)¹ The trial court sentenced appellant to 32 months state prison and ordered appellant to pay restitution fines (§§ 1202.4, subd. (b); 1202.45) plus \$31,321.92 victim restitution (§ 1202.4, subd. (f)). We vacate the order to pay Miracle Embroidery \$6,510, Quick Stop Market \$245.85, Scott Klimek \$3,700, and Chai Fanning \$1,156.12, and affirm the judgment as modified. Section 1192.5 precludes a trial court from ordering victim restitution on uncharged crimes unless it is part of the plea agreement. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1221-1224.)

¹ All statutory references are to the Penal Code.

Facts

Appellant, as owner of the San Luis Obispo Blues baseball team, wrote two stadium rental checks to the City of San Luis Obispo (City) that were returned for insufficient funds. By amended complaint, appellant was charged with issuing insufficient fund checks to City and three other victims.

On March 30, 2009, appellant waived preliminary hearing and entered a no contest plea with respect to the City checks (counts 1 and 2). Pursuant to the plea agreement, counts 3 through 5 were dismissed with a *Harvey* waiver (*People v Harvey* (1979) 25 Cal.3d 754) "regarding restitution to all counts." (See § 1192.5, subd. (b).) The named victims in the dismissed counts were Pacific Coast Media, Central Coast Distributing, and Greg Wynn.

At the April 29, 2009 sentencing hearing, the trial court asked about a restitution memo from the district attorney's office: "I didn't add them up. But it's restitution to the City[,] Central Coast Distributing, Miracle Embroidery, Quick Stop Market, [Pacific] Coast Media."² Appellant responded, "Yes, your honor."

Appellant was sentenced to state prison and ordered to pay restitution to City (\$11,343.75), Pacific Coast Media (\$2,500), and Central Coast Distributing (\$5,866.20), plus restitution on four uncharged offenses: Miracle Embroidery (\$6,510), Quick Stop Market (\$245.85), Scott Klimek (\$3,700), and Chai Fanning (\$1,156.12).

Victim Restitution

Appellant argues that the restitution order violates the plea bargain limiting restitution to the charged offenses. Where there is a departure from the plea agreement and the defendant is not informed of his right to withdraw the plea, violation of the plea agreement is cognizable on appeal even though no objection was stated. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024-1025.) The usual remedy is to allow the defendant

² The trial court did not ask about Scott Klimek or Chai Fanning who are also listed in the memo.

to withdraw the plea and go to trial on the charged offenses or specifically enforce the plea bargain. (*Id.*, at pp. 1026-1027.)

Here the plea bargain was to pay victim restitution on the charged offenses. Before the plea was entered, the trial court asked if appellant understood "you'll be pleading no contest to Counts 1 and 2" and receive a two year eight month state prison sentence. "Also, there's an agreement to make restitution, *not only as to the checks to which you entered a plea, but also the check charges that are to be dismissed*, which is a little bit under \$20,000. [¶] Do you understand that?" (Emphasis added.)

Appellant responded "Yes, sir" and said that the baseball team was being sold. The buyers "have agreed to pay those checks." "I don't know when they're going to be paid or what the deal is on that. [¶] Regardless of that, I want the court to know I recognize if it's not paid, I'm responsible for it."

Appellant was sentenced a month later and was asked if the claimed amount in the restitution memo is "agreed to or is that contested?" Appellant's counsel responded, "We agree with that." Appellant did not agree to pay restitution on uncharged check offenses.

Because a negotiated plea agreement is a form of contract, it is interpreted according to general contract principles. (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638)" (*Id.*, at p. 767.)

The plea agreement was to pay restitution on the charged offenses. To that end, appellant pleaded no contest. The restitution memo, which listed other uncharged offenses, was prepared nine days after appellant entered his plea.³

³ The prosecution, in a February 3, 2009 letter to appellant, listed other check offenses but failed to allege them when it filed the amended complaint on February 6, 2009. The plea was entered three weeks later.

We reject the argument that appellant tacitly agreed to pay restitution on uncharged offenses at the sentencing hearing. "Although the Attorney General asks that we imply such a term based upon [appellant's] express plea of no contest to a felony. . . , we are mindful of the rule that every term of a plea agreement should be stated on the record. (See *People v. West* (1970) 3 Cal.3d 595, 609-610; *People v. James* (1989) 208 Cal.App.3d 1155, 1169.) Application of this rule to the present case is essential to ensure not only that [appellant] was not made subject to a term of which he was not made fully aware prior to giving his consent to the proposed plea, . . . but also that the trial court was made aware of a term purporting to limit its sentencing authority. . . ." (*People v. Feyrer* (2010) 48 Cal.4th 426, 438.)

The cases cited by the Attorney General hold that restitution may be ordered on uncharged offenses where probation is granted. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121 [victim restitution as condition of probation]; *In re T.C.* (2009) 173 Cal.App.4th 837, 849 [*Harvey* waiver not required in juvenile proceeding where restitution ordered as probation condition].) Here the negotiated plea was state prison. Although the specific dollar amount was not set forth in the plea agreement, restitution was limited to the named victims in counts 1 through 5.

Section 1192.3 "clearly recognizes that restitution ordered on dismissed counts is valid provided the plea under which payment of restitution is made a condition was 'freely and voluntarily made, there is a factual basis for the plea, and the plea and all conditions are approved by the court.' " (*People v. Beck* (1993) 17 Cal.App.4th 209, 216.)⁴ The corollary of this rule is that a *Harvey* waiver is required where the plea agreement is to pay restitution on uncharged offenses. (See, e.g., *People v. Escobar* (1991) 235 Cal.App.3d 1504, 1512, fn 5.) Here, the victim restitution "order imposed a punishment more severe than that agreed to in the plea, and the deviation from the plea was

⁴ Section 1192.3, subdivision (b) provides: "If restitution is imposed which is attributable to a count dismissed pursuant to a plea bargain, as described in this section, the court shall obtain a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 from the defendant as to the dismissed count."

significant. It is irrelevant that [appellant] may have been willing to accept the plea agreement even if it contained no limitation on victim restitution." (*People v. Brown*, *supra*, 147 Cal.App.4th at p. 1224.)

The order directing appellant to pay Miracle Embroidery \$6,510, Quick Stop Market \$245.85, Scott Klimek \$3,700, and Chai Fanning \$1,156.12 is vacated. The judgment, as modified, is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Charles S. Crandall, Judge
Superior Court County of San Luis Obispo

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